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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 05-44481-rdd

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In the Matter of:

DPH HOLDINGS CORP., et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
300 Quarropas Street
White Plains, New York

December 21, 2011
10:12 AM

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

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Notice of Agenda Proposed Seventy-Third Omnibus Hearing Agenda
filed by John K. Lyons on behalf of DPH Holdings Corp., et al.

Notice of Agenda Proposed Fifty-First Claims Hearing Agenda
filed by John K. Lyons on behalf of DPH Holdings Corp., et al.

Transcribed by: Shalom Boroda

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1 P R O C E E D I N G S

2 THE COURT: Okay. Good morning. In re DPH Holdings.

3 MR. LYONS: Good morning, Your Honor. John Lyons on
4 behalf of the reorganized debtors. Here with me today, I have
5 my colleague, Louis Chippetta; also, Dean Unrue, DPH; and then
6 Bruce Sendek and Cynthia Haffey at Butzel Long; and finally,
7 David Smith at Togut Segal, all on behalf of the reorganized
8 debtors.

9 THE COURT: Right.

10 MR. LYONS: Your Honor, if I could quickly move
11 through before we get to the procedure issue.

12 We have a claims -- the fiftieth claims hearing.
13 There's only one matter on there and that's the Ohio Bureau
14 workers' compensation claim. We sought to adjourn that until
15 February as we work through issues. And that's it on the
16 claims agenda.

17 And then next, Your Honor, on the seventy-third
18 omnibus hearing, there are a number of matters. The first is
19 the motion to reorganize debtors to enforce plan injunction
20 against the old co-trustee.

21 THE COURT: Right.

22 MR. LYONS: That is on the verge of settlement --

23 THE COURT: Okay.

24 MR. LYONS: -- from what I understand. So that should
25 be resolved.

1 Second, the motion of Swynson Limited, as assignee of
2 evo Medical Solutions for an order compelling binding
3 arbitration. I understand that is also documentation for
4 settlement.

5 THE COURT: Okay.

6 MR. LYONS: So that will be resolved.

7 Third, Your Honor, we have the amended motion of James
8 Grye (ph.). When we were last here, we were working out the
9 various buckets that didn't implicate insurance. It's a five-
10 party agreement and we all need to verify the list. So it's
11 taking a little bit more time. But we're comfortable we will
12 get there.

13 And, as Your Honor may be aware, the Second Circuit
14 did affirm the decision. They are seeking rehearing, so that
15 will be brief. So it's --

16 THE COURT: They're seeking rehearing of a summary
17 order by the Second Circuit?

18 MR. LYONS: That's the status. So we're waiting to
19 hear back. We will put our brief in as well. And then we will
20 report to Your Honor once that --

21 THE COURT: All right. Well, I guess once that's
22 resolved the parties should promptly schedule a conference in
23 front of me as far as the next step in the litigation.

24 MR. LYONS: Right.

25 THE COURT: Okay?

1 MR. LYONS: Will do, Your Honor.

2 THE COURT: You should pass that along to both the
3 insurers' counsel as well as the Michigan -- state of Michigan
4 counsel.

5 MR. LYONS: We will, Your Honor.

6 THE COURT: Okay.

7 MR. LYONS: And then, finally, it's not on the agenda,
8 but --

9 THE COURT: Can I just -- there's -- has there been
10 any issue with GM on the Gryn order?

11 MR. LYONS: No, Your Honor.

12 THE COURT: No. Okay.

13 MR. LYONS: It's comparing various lists --

14 THE COURT: It's just getting the numbers right.

15 MR. LYONS: Exactly.

16 THE COURT: All right.

17 MR. LYONS: And there are some claims that the
18 employment predated the merger and the spinoff. So they're
19 just issues that we've got to sort through. But --

20 THE COURT: Okay.

21 MR. LYONS: -- but we'll get there.

22 THE COURT: All right.

23 MR. LYONS: Next, this is not on the agenda, but it's
24 the IUECWA pretrial conference. That, I just would like to
25 mention, at the request of the Court, the reorganized debtors

1 filed a letter explaining that the parties wanted to extend the
2 deadline to answer the complaint. We spoke with IUECWA's
3 counsel shortly after the letter was filed. And the IUECWA was
4 in agreement that it didn't make sense to have a pretrial
5 conference before the answer was filed. So --

6 THE COURT: Okay.

7 MR. LYONS: -- the pretrial conference, Your Honor,
8 we'd request --

9 THE COURT: All right.

10 MR. LYONS: -- be heard at the next omnibus hearing.

11 THE COURT: Maybe I'm remembering this incorrectly,
12 but I thought you were close to resolving that matter.

13 MR. LYONS: Your Honor, it was --

14 THE COURT: Is it sort of fallen off the tracks?

15 MR. LYONS: -- the earlier permutation was. But
16 it's --

17 THE COURT: Oh.

18 MR. LYONS: -- but it's a matter of -- we're going
19 to -- we're still in discussions with them. And --

20 THE COURT: Still working through issues. All right.

21 MR. LYONS: So the pretrial, Your Honor, would be
22 February 16th.

23 THE COURT: Okay.

24 MR. LYONS: And with that, I'm going to turn the
25 podium over to Ms. Haffey, who will deal with the adversary

1 procedures motion.

2 THE COURT: Okay. Thank you.

3 MS. HAFLEY: Thank you, John.

4 Good morning, Your Honor. Cynthia Haffey on behalf of
5 the reorganized debtors.

6 THE COURT: Good morning.

7 MS. HAFLEY: And this is the reorganized debtors'
8 motion for entry of a procedures order in the remaining
9 adversary proceedings. First, I'd like to provide the Court
10 with an update on the status of the cases.

11 There are currently, Your Honor, forty-seven, what I'm
12 going to call active cases. And there are nine additional
13 cases in which a party -- the defendant has not filed an answer
14 or otherwise responded to the original complaint.

15 THE COURT: Okay.

16 MS. HAFLEY: Of those forty-seven active cases,
17 twenty-one filed a response to the debtors' motion for entry of
18 order. Nineteen of that -- of those twenty-one were defendants
19 that are defendants at what I will refer to as the Rule 15
20 hearing defendants, and two are defendants that I'll refer to
21 as merit hearing defendants. And I will explain those
22 categories in just a moment.

23 Yesterday, Your Honor, we did have a conference call
24 with defense counsel. And eighteen defense counsel
25 participated in that call. And we were able to work through

1 and come to an agreement on some of the objections that the
2 defendants had to the debtors' proposed order. And I will
3 share those agreements and concessions that were reached
4 between the parties as I proceed this morning.

5 First, I would like to start by providing the Court
6 with a premise behind the --

7 THE COURT: Can I interrupt you just for a second on
8 the numbers?

9 MS. HAFLEY: Certainly.

10 THE COURT: Over thirty defendants filed pleadings
11 last fall asserting notice and the like issues. How many of
12 the forty-seven active ones, if you know, fell into that
13 category?

14 Or, to put it differently, how many of the forty-seven
15 fall into the category of those who have either raised the
16 issue of prejudice in connection with the motions to amend
17 and/or have raised or sought reconsideration of the Rule 4(m)
18 order --

19 MS. HAFLEY: If you can give me --

20 THE COURT: -- under Zapata and the like.

21 MS. HAFLEY: -- just a moment to count --

22 THE COURT: Right.

23 MS. HAFLEY: -- on the chart I have here, Your Honor.

24 THE COURT: Or maybe your -- I mean I don't need to
25 know the answer right away.

1 MS. HAFFEY: Okay.

2 THE COURT: I just like to get a sense of if your co-
3 counsel might be doing that while you could continue.

4 MS. HAFFEY: I can ask him to do that, Your Honor.

5 THE COURT: All right.

6 MS. HAFFEY: If you'll just give me a moment to hand
7 him my chart.

8 THE COURT: Okay.

9 MS. HAFFEY: It's how I can get that information.

10 THE COURT: I mean what I'm really focusing on is how
11 many of the forty-seven active are prepared to just move to the
12 merits and how many really want to focus on -- as they -- as I
13 have said, we need to focus, for those people, on the issue of
14 prejudice in the context of both Rule 4(m) and Rule 15.

15 MS. HAFFEY: Of the defendants that were active
16 during -- for our last hearing in October, Your Honor, I can
17 tell you those that would be proceeding on to a merits hearing.

18 THE COURT: Okay.

19 MS. HAFFEY: There would be fifteen, Your Honor. At
20 the -- in October, there were sixteen, but we've settled one of
21 those cases since then.

22 THE COURT: So fifteen would be proceeding right to a
23 trial on the merits.

24 MS. HAFFEY: That's correct.

25 THE COURT: Okay. All right. Thanks.

1 Okay, I had interrupted you.

2 MS. HAFLEY: Two of which, of those defendants, did
3 file a --

4 THE COURT: Had objected.

5 MS. HAFLEY: I'm sorry?

6 THE COURT: Two of them had filed a response to the
7 motion.

8 MS. HAFLEY: That's correct.

9 THE COURT: Okay.

10 MS. HAFLEY: The premise behind the reorganized
11 debtors' order, Your Honor, was to facilitate the movement of
12 these cases, of all of the cases -- remaining cases -- from
13 this point forward and to do so in a manner that would be
14 efficient not only for the parties, but also for this Court,
15 and to do so in a very cost-effective manner, which included an
16 encouragement of early resolution and included an ADR process.
17 So to lessen the use of judicial resources, keep the cost down
18 on the parties and to encourage early resolution.

19 We modeled the procedures order very closely to the
20 claims procedures order that I know that this Court, I believe
21 I understand, has appreciated that procedure's order and has
22 seen it as being successful in working through almost 22,000
23 claims. So when we were here in October and the Court asked us
24 to prepare a proposed procedures order, I reached out to the
25 Skadden firm, John Lyons and Louis Chippetta in particular,

1 understanding that they were the principal draftsmen with our
2 client of that order, to understand the format of that order
3 and what worked. And we then structured the order off of that
4 process.

5 The order, as I said earlier, one of the premises of
6 it was to move all of the cases through the Court. So it is
7 set up so that it includes three buckets, or three categories,
8 of defendants, if you may. Those that have not answered or
9 otherwise moved in regards to the original complaint, and those
10 are defendants that are set up for what I'll refer to as a
11 default hearing. The second category of defendants are those
12 defendants that did file either a motion to dismiss or filed an
13 opposition for our motion for leave to seek -- our motion to
14 seek leave to amend, and I'll refer to those as the Rule 15
15 hearing defendants. And then last are those defendants that
16 did not do -- file either of those of motions and they're
17 moving forward with the merits hearing.

18 And it was my understanding from the October 24th
19 hearing, from statements that Your Honor made on the record, is
20 that you wanted us to create a procedure to deal with all three
21 of those categories of defendants. So we have done that.

22 The Rule 15 category of defendants, that portion of
23 the order, again, was set up to, again, go back to the original
24 premise of the order, to facilitate an early resolution. So we
25 set up the order so that there is a process for an early meet

1 and confer. Then there would be a, if that doesn't work --
2 and, obviously, that's the least costly process for the
3 parties -- if that doesn't work, then to have a mandatory
4 mediation. If that doesn't work, then the next step then would
5 be to engage in discovery and then have a Rule 15 hearing. So
6 having the most burdensome process last, hopefully.

7 And I understand from the claims process it's been
8 very effective and either meet and confer or mediation to get
9 the proceedings resolved to be able to resolve as many of these
10 cases as possible to the meet and conserve -- meet and confer
11 or the mediation.

12 The merits hearing is designed so that the proposed
13 amended complaint would be entered and then we would then move
14 forward, get an answer from opposing counsel and then enter
15 into discovery and have a hearing. If defense counsel filed a
16 motion in regards to a Rule 12(b)(6), there would be a hearing
17 on that.

18 Yesterday during our call, defense counsel -- one of
19 the defense counsel for the merit group recognized that there
20 wasn't a process specified if a defendant wanted to file a
21 summary judgment motion. That was just an oversight on our
22 part, Judge; we have no problem adding that to the order if the
23 Court so chose.

24 So the defendants -- I'd like to discuss what the core
25 objections. And we've discussed these objections as a group

1 yesterday during our call. And, again, there were no
2 objections that were filed as to bucket number 1. And there
3 were only two defendants that raised objections to bucket
4 number 3.

5 So the Rule 15 objectors, they have an objection that
6 we have required a prejudice declaration to be filed within
7 fourteen days after entry of the order. The principle -- they
8 didn't have an objection as to the idea of a prejudice
9 declaration; it was just the timing of that prejudice
10 declaration.

11 And particularly, now that we're in the midst of the
12 holidays, we agreed as a group that we would extend that time
13 frame from fourteen days to -- we said yesterday forty-five
14 days, but I suggested later in an e-mail that we make it forty-
15 two days so that we can work with the seven-day timing rule.
16 And that time frame would start clicking on either the date of
17 the entry of the order or January 1st, whichever is later,
18 again, dealing with the issue that we're in the midst of the
19 holidays.

20 The next objection that the Rule 15 objectors had was
21 the unilateral right to the reorganized debtors' ability to
22 adjourn a hearing. And we talked about the reasoning behind
23 that, Your Honor. And that is due to -- it's really a case
24 management requirement. Due to the fact that we have a number
25 of active cases that will be proceeding in different stages

1 through this process, if one case were to need to be adjourned
2 due to a request of either of the parties, it very likely will
3 trigger a scheduling issue with another matter, either with
4 this Court or in a mediation process or whatnot.

5 So it's a right that the reorganized debtors, I
6 understand, had during the claims procedures process. We see
7 it as a -- as an ability that we're going to need in this
8 process possibly. But we did agree yesterday with the
9 defendants that we would add language into the order that would
10 require, one, that the reorganized debtors only adjourn a
11 matter in good faith, which, of course, we would do, but we'll
12 add that language; that we will attempt to gain cooperation and
13 agreement first with defense counsel and agree to a new date.
14 There already is, in the order, a restriction that an
15 adjournment can only be within a certain period of time and it
16 can't go on beyond a certain period of time.

17 And, finally, there was a concern from defense counsel
18 that -- we have in the order that there would be a five-day
19 notice of an adjournment. And there was a concern on their
20 part that that wasn't a reasonable amount of time due to the
21 fact that they have client that would be making travel plans to
22 come into town and five days just wasn't sufficient to provide
23 their clients with notice. So agreed to a ten-day notice
24 extension, rather than a five-day notice extension.

25 So I don't want to say that we've reached an agreement

1 on -- I know the defense counsel still object to our unilateral
2 right to make an adjournment. I think, with these additions
3 that I just described to the Court, that it would be very
4 unlikely that we would ever have to resort to a unilateral
5 right to adjourn. But in the event that we would, I think it's
6 necessary, again, in that because we're going to have a domino
7 effect in how a scheduling change in one case may affect
8 another. And by the time we could motion something and get it
9 heard by this Court, it very likely would be after the fact of
10 that happening.

11 Next was the portion of the procedures order that
12 dealt with mediation. The defense counsel first had a concern
13 with the briefing requirement and the answer requirement into
14 mediation. And my response to that is, like with any mediation
15 ADR, it is a process that counsel for both parties can be as
16 robust or not with their mediation briefs with the -- during
17 that process. They are all under Rule 408, so they are not
18 briefs that would ever be presented to this Court and arguments
19 made to this Court in that fashion. And it is a nonbinding
20 mediation.

21 Some of the defense counsel would like to have
22 discovery prior to mediation. Again, Your Honor, we object to
23 having discovery prior to mediation because we are trying to
24 create an order that is most cost effective. And, obviously,
25 the parties have the ability at mediation to present to each

1 other evidence to support their claims to have the most
2 successful mediation and come to the best resolution possible.
3 And it's been my experience in mediations in the many years
4 that I've been doing this that that's what parties do because
5 they want to have a good result. So we don't see discovery as
6 being necessary at that stage, nor advantageous to the parties
7 from a cost perspective.

8 And then, finally, in regards to it being a mandatory
9 process or a non-mandatory process, we believe in order for
10 this to be effective, it does need to be a mandatory process
11 and that this Court has the ability to order that there be a
12 mandatory mediation.

13 The Rule 15 hearing, then the -- in the current
14 proposed order, that is when discovery would start. And we
15 have limited the issues in discovery to the Rule 15 hearing
16 itself. I think this Court was clear during the October 24th
17 hearing that discovery would be limited at that phase. And, in
18 fact, I believe you admonished the reorganized debtors to
19 ensure that it was only limited to that nature. And we
20 included that language from the hearing in our order so that,
21 again, from a cost perspective, we're only dealing with the
22 issues that are really up for the Rule 15 hearing. And those
23 are, of course, prejudice and notice.

24 THE COURT: Is that an open issue or is that resolved?

25 MS. HAFLEY: It is an open issue in the sense that

1 defense counsel would like to have a global preliminary
2 disclosure made by the reorganized debtors. Not by defendants,
3 but by the reorganized debtors prior to that process. In fact,
4 Your Honor, they request a global preliminary disclosure made
5 by reorganized debtors within fourteen days of entry of this
6 order.

7 We strongly object to that. We see that as putting,
8 frankly, the cart before the horse. The defense counsel is, in
9 doing so, is taking a process that this Court is set up, again,
10 to be a hearing on the issues of prejudice and notice, and it's
11 the prejudice the defendants have been telling this Court for
12 two years now that they have. And rather than deal with that
13 issue at the Rule 15 hearing, instead, they want to jump to a
14 full-blown global disclosure process and only on the part of
15 the reorganized debtors and early on. And, again, I think
16 we'll find ourselves in a morass of discovery motions and
17 issues before we even get to the Rule 15 hearing issues. And
18 it is out of keeping with what I think this Court had asked us
19 to do, and that is to set up a procedures order for a Rule 15
20 hearing.

21 Other than that, there were some defense counsel that
22 objected to the limit of interrogatories and document requests
23 and requests for admission at that process. But I believe --
24 and I don't want to speak for them; they'll tell you if I'm
25 wrong on this -- that we -- ultimately, there was an agreement,

1 at least amongst some defense counsel, that they were okay with
2 the more limited nature for the Rule 15 hearing because of the
3 limited scope of that hearing. But then, later on, when we got
4 to the merits trial, they wanted to have the ability to conduct
5 discovery to the extent permitted under the Federal Rules. And
6 we are in agreement with that, Your Honor.

7 The defendants' next objection regarding the Rule 15
8 hearing is regard to briefing. And they wanted the -- in their
9 briefs, they state they wanted the ability to file a sur-
10 surreply. Again, I -- they will correct me if I'm wrong, but I
11 think we've worked through that issue and come to an agreement.
12 Both parties, as the current -- our current proposed orders --
13 each party has two bites at the apple, if you would, Your
14 Honor. Both parties are providing the Court with two briefs.
15 There's an initial brief by the defendants, a response brief on
16 our part, a reply and a surreply. And no one wanted to burden
17 the Court beyond that and have a sur-surreply. So I think we
18 came to an agreement on that.

19 THE COURT: I may not read the last -- I usually don't
20 take four briefs unless I ask for it.

21 MS. HAFLEY: Okay.

22 THE COURT: I don't understand why a --

23 MS. HAFLEY: So that fourth brief, Your Honor, would
24 be the brief that reorganized debtors would file. And if the
25 Court is telling us that you do not want us to do that, we'll

1 strike that from the order.

2 THE COURT: Well, I usually only take something like
3 that if the responsive brief raised new issues or made
4 statements of fact or statements of law that basically makes
5 the other side's hair stand on end.

6 MS. HAFLEY: It's a good standard.

7 THE COURT: All right.

8 MS. HAFLEY: The next objection, Your Honor, that
9 reorganized debtors have to the proposed order is they've
10 struck everything in their proposed order from that point
11 forward. So any of the merits hearing process was struck.

12 I think, in part, but not totally, due to the fact
13 that the principal drafters of the proposed order on behalf of
14 defendants are Rule 15 hearing defendants and didn't recognize
15 or, maybe, fully appreciate the fact that there are defendants
16 that will be going straight to the merits hearing and that this
17 Court had asked us in October to put forth an order in regards
18 to that process as well, they do have a further objection as to
19 that, though. And that is that they do not believe that this
20 Court should -- that we should have an order further than the
21 Rule 15 hearing because they may be dismissed at the Rule 15
22 hearing stage and why go further than that at this stage.

23 My response to that is twofold. One, of course,
24 because we already -- we have defendants already in that phase
25 and we do need to have an order to deal with those cases. My

1 second response to that is that if a defendant is dismissed at
2 the Rule 15 stage, then no harm, no foul, whether there's an
3 order that continues for other defendants. And then as to the
4 defendants that would continue, we do need to have an order in
5 place at that time as to then what the next step would be.

6 And we have all defendants right now in the same
7 procedural posture in these cases. And I think now is the
8 unique time in which to gather all of the parties and have
9 these discussions and have an order entered, rather than wait
10 and do it on a piecemeal basis, as the Rule 15 hearings --
11 because they're going get a staggered phasing -- proceeds with
12 this Court.

13 As to the actual trial procedures, the defendants do
14 have -- did have some objections. One of the merits hearing
15 defendants requested that there be a comparable mediation
16 process for those defendants that go right to merits hearing.
17 And we have no disagreement with that, Your Honor. So we
18 agreed to that. Earlier, I mentioned there was also a request
19 that the order specifically address the right to be able to
20 file summary judgment motions. And we have no disagreement
21 with that.

22 There was also --

23 THE COURT: And also -- and obviously, they won't --
24 I'm assuming that the order will provide that they'll be heard
25 before the trial.

1 MS. HAFHEY: Tat's correct, Your Honor.

2 THE COURT: Okay. Okay.

3 MS. HAFHEY: There was also an objection as to the
4 time frames that were placed in the procedures order. And, if
5 I may, the defendants, in their response brief, criticized
6 reorganized debtors in the tight time frames and state that it
7 was done, I think, for some ill intent. It wasn't; it was
8 actually to acknowledge what I thought I'd heard from defense
9 counsel for the last couple years, and that is they want to
10 keep these cases moving; it's been too long and their clients
11 want this resolved. So it was in that vein and with that
12 thought in mind that we drafted these tight time frames. So we
13 have no problem, Your Honor, in extending out the time frames
14 with defense counsel.

15 In particular, we talked yesterday in regards to the
16 filing of an answer and/or a response -- other response to the
17 amended complaint once it's entered and agreed that the normal
18 rules under the Federal Rules of Civil Procedure would apply.
19 The defendants have also requested that the time frames for
20 discovery and other matters also follow strictly to the Federal
21 Rules of Civil Procedure.

22 We would propose, Your Honor, to maybe meeting halfway
23 on that one. Of course, what this Court wants to do, we will
24 do. The only reason I'm suggesting maybe we don't need that
25 long a time frame is because we have been proceeding through

1 these cases now for a couple of years; we will have gone
2 through a meet and confer and a mediation and the Rule 15
3 hearing on many of these cases, where discovery will already
4 have been exchanged. So perhaps we don't need as long a time
5 frame.

6 And as far as the amount of discovery that is
7 exchanged during that process, the defendants objected and want
8 to have what is currently permitted under the Federal Rules.
9 Again, we shortened or limited the number of exchanges, again,
10 to keep down cost as well as timing. But if defendants aren't
11 concerned about the timing as they thought they were, we don't
12 have a problem with that, Your Honor.

13 THE COURT: Okay.

14 MS. HAFHEY: And unless the Court has some questions.

15 THE COURT: Well, I just want to hear from the other
16 parties. I mean I've been through the proposed orders. And my
17 view on the open issues and -- I'll let you know. But --

18 MS. HAFHEY: All right. Thank you.

19 THE COURT: Okay.

20 MR. HERMAN: Good morning, Your Honor. I have the
21 enviable task of responding to Ms. Haffey's presentation this
22 morning.

23 THE COURT: Okay.

24 MR. HERMAN: I speak on behalf of Victory Packaging.
25 Ira Herman, Thompson & Knight, for Victory Packaging.

1 A number of other of the defendants will probably join
2 in what I have to say, so I think Your Honor can assume that
3 although I'm not representing the other parties, they will be
4 joining in. And you can hear from them whether or not they
5 join in at the right time.

6 I was trying to figure out how to organize what I
7 wanted to say this morning, Judge. The first principle is the
8 debtor comes to you as if you're looking at this motion in a
9 vacuum and there's been no history to this case. And there has
10 been a lot of history and a lot of water has gone under the
11 bridge. And it's not a tabula rasa.

12 The debtors -- whether it was proper for the Court to
13 approve it not, I'm putting that issue aside -- the debtors
14 themselves chose to seal complaints for two years and then
15 serve them two years later. Whether it was right, wrong or
16 indifferent, they chose that process and they have to take the
17 benefits and the burdens of having made that election. And I
18 think that the Court has already acknowledged that, when you
19 talked about some burden shifting at some of the different
20 hearings.

21 So let's talk about the merits affidavits. My client
22 has no issue with filing the merits affidavit. But my client
23 wants to be able to file a complete merits affidavit.

24 THE COURT: I'm sorry?

25 UNIDENTIFIED SPEAKER: Prejudice.

1 MR. HERMAN: Prejudice. I'm sorry, prejudice
2 affidavit. I -- nomenclature. Apologies, Judge. The record
3 should reflect that I meant to say --

4 THE COURT: Look, I already set it up. We're going to
5 have individual hearings on prejudice for both for and
6 purposes --

7 MR. CURTIN: Right.

8 THE COURT: -- and Rule 15 purposes. I've already
9 ruled on that. This is just about procedures for getting
10 there.

11 MR. HERMAN: I understand, Judge.

12 THE COURT: So I don't want to hear any more about
13 that.

14 MR. HERMAN: I'm not arguing about that at all, Judge.

15 THE COURT: Okay. Others did. I don't want to hear
16 it.

17 MR. HERMAN: Your Honor, I already stated that we have
18 no objection about that.

19 THE COURT: I couldn't have been clearer in my ruling
20 on -- in October -- I'm not talking to you; I'm talking to
21 other people. In my ruling in October, I expected this to be
22 done in about two weeks. The parties expected it to be done in
23 about two weeks. And I'm, frankly, shocked that we're here in
24 December on it.

25 So let's move on and focus on this as if we're really

1 dealing with nuts and bolts --

2 MR. HERMAN: Okay. Nuts and bolts, Judge.

3 THE COURT: -- of the issues that are before the
4 Court.

5 MR. HERMAN: Judge, the debtors have talked about --

6 THE COURT: This is a pretrial conference.

7 MR. HERMAN: Okay, Judge. I'm -- the debtor really is
8 focused on expense and time-saving and what's --

9 THE COURT: Right.

10 MR. HERMAN: -- what's going to be effective to get
11 the job done. And I'll just handle it on that level, Judge.

12 THE COURT: Okay.

13 MR. HERMAN: The reason, as draftsmen -- and I was a
14 principal draftsman of the proposed order -- that I propounded
15 the idea of the preliminary global discovery: very limited and
16 it will facilitate resolution of these cases. All we have
17 asked for -- and we can work out language if Your Honor thinks
18 it's too broad -- is for the debtor to disclose the status of
19 its electronically-stored information and the custodians of
20 that information. Because what the debtors' order does is it
21 looks at prejudice only with regard to what's happened at each
22 of the defendants, as opposed to the global prejudice to all
23 the defendants that was caused by the passage of time. And the
24 passage of time itself is a form of prejudice --

25 THE COURT: Well, let me cut through -- let me -- I

1 think I understand what you're saying; let me try to summarize
2 it. All right? As far as the discovery for the prejudice
3 hearing is concerned, you're contending that one of the issues,
4 as far as prejudice is concerned, is whether you can actually
5 look at an accounting system on the debtors' side that gives
6 you a history of the transfers. Right? Is that really it?

7 MR. HERMAN: It goes beyond that, Judge.

8 THE COURT: And if they don't have it, then you're
9 prejudiced because everyone is reconstructing it?

10 MR. HERMAN: Your Honor, their -- they had an
11 interactive system called DACOR that they're relying on.

12 THE COURT: All right.

13 MR. HERMAN: Some of the information, like the PO
14 information that the reorganized debtors have relied upon to
15 propound their amended complaints, that information resided
16 only on the DACOR system. Our client never had that
17 information. Our client relied on their system and their
18 access to that system --

19 THE COURT: Okay.

20 MR. HERMAN: -- to recover that information. It goes
21 to the very heart of the amendment of the complaint, Judge.

22 THE COURT: But how does it go to prejudice?

23 MR. HERMAN: Judge, how can my client defend itself if
24 that information doesn't exist? And shouldn't Your Honor --

25 THE COURT: Wait, wait, wait, wait.

1 MR. HERMAN: -- shift the burden to the debtor --

2 THE COURT: Wait, wait, no, no, wait, wait. Wait.

3 The debtor has the burden, as the plaintiff --

4 MR. HERMAN: Right.

5 THE COURT: -- in showing a preference. I'm not -- I
6 mean -- I'm not -- I have an open mind on this. But it seems
7 to me that if they don't have the information, they're not
8 going to carry that burden.

9 MR. HERMAN: But, Judge, I want them to tell me now.

10 THE COURT: Because?

11 MR. HERMAN: Our group has spent millions of dollars
12 defending these cases, Judge. I'm not asking for them to
13 disclose content, just the status of the information.

14 They have -- the debtor has delivered a letter dated
15 August 27, 2007 to many of the defendants advising that they'd
16 be taking down the DACOR system and putting up the information
17 on another system. I can represent to the Court that the
18 client has advised me that that information was never put up on
19 the second system.

20 If that information, sometime between August of 2007
21 and today, has disappeared, that's spoliation, Judge, and these
22 cases should be over on that basis alone. Based on the rules
23 of this --

24 THE COURT: All right. So --

25 MR. HERMAN: -- district court.

1 THE COURT: -- in essence, you're saying -- and I
2 understand this argument -- that you want to make sure that at
3 the end of the day, the debtors have the rudimentary basis
4 based on their own documents, their own accounting documents,
5 to show their case.

6 MR. HERMAN: No, Judge.

7 THE COURT: Is that what you're basically saying?

8 MR. HERMAN: I'm looking at prejudice.

9 THE COURT: Well --

10 MR. HERMAN: Stuff changed --

11 THE COURT: -- that is prejudice because they're
12 looking to amend their complaint when they don't have the --

13 MR. HERMAN: That's right.

14 THE COURT: -- the underlying basis.

15 MR. HERMAN: But I need to be able to assert that
16 prejudice, rather than just on speculation based on inferences.
17 We have inferences that the information no longer exists in
18 native form. And, certainly, we don't have access to it, which
19 we did have prior to 2000 -- August of 2007.

20 THE COURT: All right.

21 MR. HERMAN: There has been a change after the time
22 that the debtors were working on these complaints in August of
23 2007.

24 THE COURT: So you're -- okay.

25 MR. HERMAN: And the status of the ESI, Judge.

1 THE COURT: All right. So you're not looking to take
2 discovery into the individual transfers; you just want to make
3 sure the records are still there?

4 MR. HERMAN: I want to know the status of the ESI,
5 Judge. I have, in my hand, the book brief and the excerpt from
6 the ADI best practices on what the debtor was supposed to have
7 done to protect and preserve the ESI. Your Honor is very well
8 aware of Judge Scheindlin's decisions in the Lockheed cases and
9 what the debtors' obligations were. But --

10 THE COURT: All right.

11 MR. HERMAN: -- Judge, remember when I started and I
12 said this is not in a vacuum? They chose to seal these
13 complaints up for two years. That was their choice. That's
14 fine. But they had a duty to protect and preserve the evidence
15 they were going to use to prosecute those cases or that
16 would -- had to be made available to defendants -- to defend
17 those cases. That's black-letter law in this district,
18 Judge --

19 THE COURT: Okay, I understand --

20 MR. HERMAN: -- under Rule 26.

21 THE COURT: -- I understand that point.

22 MR. HERMAN: And all we're doing, Judge, is saying --

23 THE COURT: Why does that -- in --

24 MR. HERMAN: Because, Judge, the case is over if they
25 don't have it.

1 THE COURT: But I guess what I'm -- why does that
2 go -- I was looking at the language. And maybe I -- maybe I --

3 MR. HERMAN: Let me just add one thing, Judge. I
4 think they --

5 THE COURT: All right.

6 MR. HERMAN: -- can answer this in two pages. They
7 have to tell us where and the status of the evidence is.

8 THE COURT: That's right. And you're looking for
9 people who know about it?

10 MR. HERMAN: And -- right. Because, Judge, how the
11 evidence is recovered is germane to the ESI inquiry. If --

12 THE COURT: Well, I guess what I was focusing on was
13 (c) .

14 MR. HERMAN: Go ahead, Judge.

15 THE COURT: (c) I didn't -- (c) went beyond that in
16 your --

17 MR. HERMAN: Well let's see what (c) says.

18 THE COURT: It says "the identity and availability of
19 each employee or former employee of the debtors who is likely
20 to have discoverable information that may be relevant to the
21 proposed amended complaint". That goes beyond this basic --

22 MR. HERMAN: Well, no, Judge, because --

23 THE COURT: -- point.

24 MR. HERMAN: -- to the extent former employees of the
25 debtor who would be witnesses are no longer available because

1 of the passage of those two years -- or three years, however --
2 or four years, Judge, that is an issue of prejudice. That's
3 why we included that.

4 THE COURT: All right. But this goes beyond that.

5 MR. HERMAN: Well, we just want to know who's around.
6 And I think, Judge, to the extent that a former employee who
7 would be a custodian or who would -- had conversations with our
8 clients, they're not around, Judge. That's a form of
9 prejudice. It deprives the defendants of their ability to
10 defend the case.

11 THE COURT: Well, what do you mean by "they're not
12 around"? I mean what do --

13 MR. HERMAN: They could have died, they could have
14 moved overseas, the debtor could've lost -- the reorganized
15 debtors could have lost contact with them. I believe the
16 reorganized debtors has one employee -- correct me if I'm
17 wrong -- at this point. So I don't know where these people
18 have scattered to. And what they have to say may be germane to
19 litigation.

20 And to the extent that it's been four years that have
21 gone by since 2007, almost five years -- well, four-and-a-half
22 years. Judge, that is prejudice. I'm not even going into the
23 passage of time itself as prejudice because of the fading of
24 memories. I'm saying people may be gone who should be
25 witnesses and would have been witnesses back in 2007, had these

1 complaints been filed and served back in 2007. So that goes to
2 prejudice.

3 So that is why we're just looking for a list of names
4 and addresses, if they're available, and we're looking for the
5 status of the electronically stored information. I would love
6 to see, Judge -- and I haven't really asked for it -- a copy of
7 their litigation freeze letter to the debtors -- to the
8 debtor --

9 THE COURT: I'm sorry, their what?

10 MR. HERMAN: The litigation hold. The letter that
11 counsel is obligated to send to impose a freeze on ESI so
12 nothing gets destroyed. It's gross negligence, Judge, as under
13 Judge Scheindlin's rulings in this district, if that letter
14 didn't go out and information was destroyed. And again, Judge,
15 that's prejudice and grounds for dismissal of these cases.

16 It's cheap and easy, Judge. There's one set of
17 discovery we're asking for. And in response to that, Judge, we
18 will produce a Rule 15 prejudice affidavit from our clients --
19 or declaration from our clients. And we'll make the same
20 disclosures about what's missing from our clients' side of the
21 ledger. But we can't make a declaration without knowing what's
22 missing from the debtors' side of the ledger in terms of
23 evidence.

24 And it's only fair, Judge, to make the debtor make
25 those very, very, very narrow disclosures. It's a list of

1 names and addresses, Judge, and it's a description of how their
2 information is currently being stored, how it was stored and
3 how they can recover it.

4 THE COURT: Okay.

5 What's your response to that?

6 MS. HAFLEY: I have a couple responses, Your Honor.

7 First of all, I think this Court has already dealt
8 with this issue in the June 21st hearing. In response to
9 similar arguments from defense counsel, this Court made it
10 clear that this was not a Rule 8, but, instead, a summary
11 judgment-type of issue or a trial issue in determining
12 spoliation of evidence.

13 Secondly, however, I think what defendants are trying
14 to do here is to try to avoid having to put forth their actual
15 prejudice. They have been telling this Court now, for two
16 years --

17 MR. HERMAN: No, they're going to do -- no, I -- as I
18 see it, the request on the legacy accounting system is a
19 legitimate one. I mean if the debtors -- that should be easy.
20 You either or you don't. If you don't have it, then there's no
21 reason to go forward.

22 MS. HAFLEY: Well --

23 THE COURT: I mean this is silly.

24 MS. HAFLEY: Well --

25 THE COURT: If you do have it, then you can just

1 identify it.

2 MS. HAFLEY: But -- and my response to that, Your
3 Honor, as in why I think there's something else going on here,
4 is defendants know we have the information. As you --

5 THE COURT: Well, they don't. I mean --

6 MS. HAFLEY: If it --

7 THE COURT: -- the only issue I'm having a hard time
8 with here is (c) in his list, where they're asking you to
9 identify everyone who may be relevant to the complaint.

10 MS. HAFLEY: But the --

11 MR. HERMAN: Judge, I would take a good faith effort
12 at it and make it nonexclusive. But I think the parties are
13 entitled to know who's gone because of the passage of time.

14 THE COURT: Well, I think you would need --

15 MS. HAFLEY: If --

16 THE COURT: -- I think it's fair to say who you intend
17 to rely on --

18 MS. HAFLEY: Well, if I can --

19 THE COURT: -- as far as the complaint.

20 MS. HAFLEY: -- finish my initial response, Your
21 Honor, first --

22 THE COURT: Okay.

23 MS. HAFLEY: -- and then I'll respond to that.

24 The reason I say that it's evident we have the
25 information is, if this Court remembers, we were required by

1 the Court to file an amended complaint that satisfied the
2 Iqbal-Trombly standard. And to do that, we had to add dates,
3 real information, sometimes it's invoice information, down to
4 the specific individual transfer.

5 THE COURT: Why is this a big deal? I don't
6 understand why it's important.

7 MS. HAFHEY: Well, the big deal is -- and I agree with
8 you completely, Your Honor -- with (c), until we know what
9 their --

10 THE COURT: Right. Well as far --

11 MS. HAFHEY: -- prejudice arguments are going to be --

12 THE COURT: -- as far as (c) --

13 MS. HAFHEY: -- I can't answer (c).

14 THE COURT: -- I think -- I think you should say that
15 your present intention is to rely upon -- if you can rely upon
16 any witness, X, Y and Z for our direct case. You don't know
17 what defenses they're going to raise as far as ordinary course
18 or the like. So you can deal with that at the hearing.

19 But I think you should say who you're going to rely on
20 in your direct case. If that -- they should know that.

21 MS. HAFHEY: My only contention with that, Your Honor,
22 is we have that in place in the discovery phase before the Rule
23 15 hearing.

24 THE COURT: But do --

25 MS. HAFHEY: They have the right to take discovery and

1 ask those interrogatories as to what witnesses do you plan on
2 relying on, and in that phase of the case. But to require
3 the --

4 THE COURT: Look, I'm assuming it's an accounting
5 person, right? I mean --

6 MS. HAFLEY: Well, again, I don't know what sort of
7 prejudice they're going to allege as to whether that is or not.

8 MR. HERMAN: Judge, may --

9 THE COURT: They want to know whether this is a waste
10 of time. If it turns out, for example, that the only basis for
11 your case comes out of what they produce, they have a right --
12 and I have right -- I would be very upset by that because you
13 would have brought this whole thing --

14 MS. HAFLEY: I understand.

15 THE COURT: -- without having the information --
16 without having the basis for asserting the complaint.

17 And so I think it's fair for them, particularly given
18 that there needs to be an underlying belief that there's a
19 reason to go forward with this -- with each particular
20 complaint that you could actually make a prima facie case. I
21 think it's important to identify your witness and the
22 accounting information for your prima facie case.

23 Now, I agree; if they say -- you don't know what their
24 defense is going to be. So you should be able to supplement
25 that before the prejudice hearing with additional people, and

1 I'll consider whether that person's dead. I mean if they say
2 it's ordinary course and you say well, we can't -- we don't
3 know that because Mrs. X passed away, well, maybe that's it
4 because I don't know how -- if they could make a prima facie
5 that it's ordinary course, you're going to lose on the ordinary
6 course defense. So that should be the end of it. There should
7 be -- there's no reason to proceed with the amended complaint
8 at that point because you won't be able to prove your case.

9 But I don't -- that person, you should be able to add
10 on responding to their affirmative defenses. But I think, just
11 to identify your direct case witnesses is a fair request.

12 MR. HERMAN: And they can have as much time, Judge, as
13 they want. We can --

14 THE COURT: You could have --

15 MR. HERMAN: -- doesn't have to be fourteen days. I
16 thought they wanted short time periods.

17 THE COURT: -- you could -- that's within your
18 control. You could have forty-five days to that or you could
19 do it --

20 MR. HERMAN: Whatever you want --

21 MS. HAFLEY: Well --

22 THE COURT: -- you could do it shorter.

23 MR. HERMAN: -- as far as I'm -- Judge, I --

24 MS. HAFLEY: -- if I could --

25 MR. HERMAN: -- before you ask Ms. Haffey to extend, I

1 just wanted to add that by making these preliminary
2 disclosures, which should be two or three pieces of paper, not
3 more than that, it will facilitate the ability to resolve these
4 cases.

5 THE COURT: Well, that's a separate issue. I was
6 going to -- on the mediation, I was going to say look, I'm
7 assuming that they would be providing that information to you
8 there because any mediator's going to say well, if you haven't
9 provided it, then obviously you don't have a strong case and so
10 I'm going to recommend a low settlement.

11 MR. HERMAN: Well, Judge, I have a lot of problems
12 with the way they proposed the mediations.

13 THE COURT: Well, leave that aside. As far as --

14 MR. HERMAN: Let's get to that later.

15 THE COURT: -- as far as the initial disclosures for
16 the -- what's labeled here the Rule 15 hearing -- although,
17 again, I want to be clear. The evidence that I'm going to take
18 on the Rule 15 hearing is also applicable to the remaining 4(m)
19 issue, which is whether I should -- I certainly don't lack --
20 or to reconsider the issuance of the last order in 2007. And
21 as I read the case law, I consider that, for those who did not
22 get notice, as a de novo review based upon factors that I have
23 to take into account now as far as what's happened.

24 So I'm going to use that record for both of those
25 things. So it's fine to label if Rule 15, but it's not just

1 Rule 15. And I was clear on that in October. But that's a
2 sideline.

3 So my -- I think that this paragraph in the order is
4 really, as far -- except for the fourteen days, is fine, except
5 for (c) at the end, which is -- it should say the identity and
6 availability of each person --

7 MR. HERMAN: That the debtor knows will be involved.

8 THE COURT: -- that the debtor -- the debtor
9 intends --

10 MR. HERMAN: Right.

11 THE COURT: -- to rely upon for its direct case. And
12 that's --

13 MR. HERMAN: And, Your Honor, we will allow them to
14 supplement, as Your Honor --

15 THE COURT: Yes. And that's subject to
16 supplementation.

17 MR. HERMAN: That's just fine, Judge.

18 THE COURT: Yes. Okay. I mean I'm assuming it's an
19 accounting person, right?

20 MS. HAFLEY: And again, Your Honor, I'm very concerned
21 that it -- because we don't know the prejudice arguments that
22 they're going to make

23 THE COURT: Well, that --

24 MS. HAFLEY: If I can give an example, like maybe --

25 THE COURT: -- you could deal with that in the future.

1 When they respond to that, then you'll have to see --

2 MR. HERMAN: They're free to supplement the list,
3 Judge, at that point.

4 THE COURT: Right. Right.

5 MR. HERMAN: I would not quibble with that --

6 THE COURT: Right.

7 MR. HERMAN: -- one iota, Judge.

8 THE COURT: Okay.

9 MR. HERMAN: Your Honor, just one background.

10 MS. HAFLEY: If I --

11 MR. HERMAN: When I prepared that paragraph, Judge, I
12 spoke to a technical computer person. That's why the language
13 is drafted the way it is, about native form and the like.

14 THE COURT: I'm just focusing on (c). The other stuff
15 I understand.

16 MR. HERMAN: Thank you, Judge.

17 THE COURT: Okay. All right.

18 Now, as far as the timing is concerned, I think the
19 debtors should produce that first. You're representing to me
20 that you actually have this DACOR system, right?

21 MS. HAFLEY: We have the DACOR system that has been
22 imaged. So when this change took place that Mr. Herman is
23 referring to, that information was preserved and imaged.

24 THE COURT: Okay.

25 MS. HAFLEY: So we have that information.

1 THE COURT: All right.

2 MS. HAFLEY: As well as there are hard files as well,
3 and other documents that one would expect in litigation.

4 THE COURT: All right. Well, the reason I'm asking
5 this is I'm somewhat reluctant to have the initial disclosures
6 in connection with these Rule 15 hearings taking ninety days in
7 total.

8 So my -- I would like to -- I understand we're in the
9 holidays. But I'd really like to have this earlier from the
10 debtors and maybe even start the clock running a little earlier
11 for the defendants, too, on this. Because I've been told for
12 months that there's prejudice here. And people have submitted
13 affidavits saying there's prejudice. So it seems to me that
14 the extra time you'll need is to review what they've submitted.
15 But most people are going to be refilling what they've already
16 filed, I think.

17 MR. HERMAN: That's probably true, Judge.

18 THE COURT: Right.

19 MR. HERMAN: I think where we quibble with the
20 reorganized debtors was there are two lenses to focus through:
21 what's happened to debtor --

22 THE COURT: Right.

23 MR. HERMAN: -- and what's happened to the defendants.

24 THE COURT: Okay. So --

25 MS. HAFLEY: Your Honor, if I could interject quickly.

1 In regards to the timing, I am going to need,
2 obviously, to work with my client --

3 THE COURT: Right.

4 MS. HAFLEY: -- who is going to have to -- which is
5 DPH -- will have to also work with Delphi. They're shut down
6 for the holidays.

7 THE COURT: Well, can -- I mean --

8 MS. HAFLEY: They shut down yesterday.

9 THE COURT: All right. Can we do it thirty days
10 instead of forty-five from the later of June 1st or the
11 order -- January 1st or the order, and then thirty days for the
12 defendants in response?

13 MS. HAFLEY: My second concern is we're talking fifty-
14 one cases. I understand --

15 THE COURT: But again, this is just -- I mean -- I --

16 MS. HAFLEY: And it's just the paragraph -- the
17 portion (c) that concerns me.

18 THE COURT: But it's just a -- it's an accountant,
19 isn't it? I mean isn't this someone who can verify the
20 books -- the transfer was made?

21 MS. HAFLEY: If that is the --

22 THE COURT: I mean I'm -- look, I mean --

23 MS. HAFLEY: -- if it's a business records --

24 THE COURT: -- normally, that's what most --

25 MS. HAFLEY: -- if it's a business records person I

1 need to identify --

2 THE COURT: Right.

3 MS. HAFLEY: -- I don't think that's an issue.

4 THE COURT: And these are preference cases.

5 MR. HERMAN: But, Judge, I don't think it's limited to
6 an accounting type. There has to be somebody who knows --

7 THE COURT: Well, you may have a -- you may have a --
8 I mean I guess you -- that's true. You may have to have a
9 witness on insolvency also, I suppose. Although most of these
10 are within the ninety days, right?

11 MR. HERMAN: Judge, there were nine divisions, if I
12 understand the facts correctly.

13 THE COURT: Right.

14 MR. HERMAN: There may be nine different individuals
15 who were -- one for each of the divisions.

16 THE COURT: Right.

17 MR. HERMAN: I don't know how they organize their
18 accounting functions.

19 THE COURT: Well, I'm happy to extend it if you're
20 having problems on identifying the people. I think the DACOR
21 stuff should be done in thirty days.

22 Okay, so let's --

23 MS. HAFLEY: That will be no problem, Your Honor.

24 MR. HERMAN: Right, Judge. And as --

25 THE COURT: -- let's go thirty and thirty on that.

1 MR. HERMAN: -- as one of my colleagues just reminded
2 me, there are only nineteen cases that are Rule 15 cases at
3 this point. But I guess it applies to 4(m) as well.

4 THE COURT: Really? Oh, yes.

5 MR. HERMAN: I think that's about right.

6 THE COURT: Okay. Well, no, because there are only
7 fifteen that are going right to the merits. So I think it's --

8 MR. HERMAN: Right.

9 MS. HAFLEY: Right. There's more.

10 THE COURT: -- yes, so there are more. But anyway,
11 it's -- I -- the deadline should be -- for the initial
12 disclosure should be thirty days and thirty days. And I think
13 we're clear on what's the language in (c).

14 MR. HERMAN: Thirty days and thirty days from January
15 1, Judge?

16 THE COURT: The later of January 1 or the time the
17 order is submitted, which is going to probably be before
18 January 1.

19 MS. HAFLEY: Thank you, Your Honor.

20 THE COURT: Okay. All right.

21 MR. HERMAN: Your Honor, how would you like to
22 proceed? Would you like to ask me questions or you want me to
23 make a presentation at this point?

24 THE COURT: Well, just going through the points that
25 Ms. Haffey was talking about, and then we can come back on --

1 to my mind, with any adjournment, I will always ask the parties
2 is it on consent or not. And if it's not, I'll ask for a good
3 reason.

4 So I guess I'm really not -- and it's my calendar,
5 ultimately. And it's a very busy calendar. And -- so whether
6 the debtor does this on its own or not, my view is that we
7 should just stick to that process. It's on --

8 MR. HERMAN: Which process, Judge?

9 THE COURT: Adjournments will be granted, subject to
10 the Court's calendar, on consent, provided that there's ten
11 days' notice or for good reason.

12 MR. HERMAN: Judge, why don't we build something very
13 easy into it, like each side can write a letter to you. We
14 don't have to have a hearing --

15 THE COURT: Right.

16 MR. HERMAN: -- if there's a problem. Or a telephone
17 conferences --

18 THE COURT: No, let's just phone call. Yes

19 MR. HERMAN: -- a phone call.

20 THE COURT: Right.

21 MR. HERMAN: Why don't we build that in, Judge, that
22 if there's any dispute about adjournments, the Court will make
23 itself available to resolve them --

24 THE COURT: Right.

25 MR. HERMAN: -- subject to its calendar.

1 THE COURT: Right.

2 UNIDENTIFIED SPEAKER: But it'll be bilateral.

3 MR. HERMAN: And it's bilateral that way.

4 THE COURT: Right.

5 MR. HERMAN: And Your Honor is controlling --

6 THE COURT: But ten days' --

7 MR. HERMAN: -- his own calendar.

8 THE COURT: -- ten days' notice.

9 MR. HERMAN: Ten days. And the reason, Judge, unless
10 parties consent, is their folks out of town would have to
11 travel in.

12 THE COURT: I understand. It also -- we're talking
13 about evidentiary hearings here. And I set every day. So it's
14 going to be hard to rearrange the schedule.

15 MR. HERMAN: Understood.

16 THE COURT: Okay. All right.

17 Okay. Let's turn to the settlement procedures here.

18 First -- and I'm working off of the debtors' proposed
19 order on this -- it wasn't clear to me what the initial meet
20 and confer was supposed to be about. Was it really intended to
21 discuss the initial aspects of settlement?

22 MS. HAFLEY: Yes.

23 THE COURT: Okay.

24 MS. HAFLEY: To resolve the entire matter, if
25 possible, Your Honor.

1 THE COURT: Okay.

2 MR. HERMAN: Your Honor, may I make a comment?

3 THE COURT: Right.

4 MR. HERMAN: I think -- I'm hopeful we'll bridge the
5 gaps.

6 THE COURT: Okay.

7 MR. HERMAN: My suggestion would be, Judge, that
8 there -- that we can set up a meet and confer after both sides
9 have delivered their prejudice --

10 THE COURT: Their initial declarations.

11 MR. HERMAN: Right, their initial declarations --

12 THE COURT: Right.

13 MR. HERMAN: -- it makes sense, shortly thereafter.
14 Or we should be able to go straight to mediation on the Rule 15
15 issues only, Judge. And since that's the only matter that's
16 before the Court at this point, I think that's the only thing
17 that the rule governs.

18 THE COURT: Well, let me -- all right. It does seem
19 to me that the parties should at least be required to meet and
20 confer on the potential for a settlement. I am a big fan of
21 mediation.

22 And as I think everyone in this room understands, the
23 litigation of a preference claim on the merits at a trial is
24 something that almost never happens. I've done it -- and I've
25 had thousands and thousands of preference claims. I've done

1 it, maybe, twice in nine years. And both times involved
2 parties that really didn't have lawyers and just didn't know
3 what to do. And they basically wanted me to resolve it for
4 them.

5 So there is a good reason to push the parties to do
6 that sooner rather than later. The only issue I have here is
7 that the -- some of the objectors have said they really want to
8 leave that as an option for themselves. And I'm really of two
9 minds about that.

10 MR. HERMAN: I have a couple thoughts about mediation,
11 Judge.

12 THE COURT: Let me just finish one other point.

13 MR. HERMAN: Sure.

14 THE COURT: It seems to me that to be truly useful, a
15 mediator would want to hear about the merits as well. I just
16 think that's what the person would do on almost every occasion.

17 What I don't see requiring here, though, is an
18 elaborate presentation on the merits. I think the parties
19 should be prepared to discuss the merits, I don't think they
20 need to be put to elaborate mediation statements about the
21 merits of the preference claims.

22 MR. HERMAN: I don't say this with hubris or ego,
23 Judge, but I recently some difficult preference cases as
24 mediator.

25 And the one thing that really troubled me about the

1 process they're setting up is they're trying to set up
2 something that's compulsory. And you know what happened with
3 the good-faith argument. People who go to mediation really
4 need to want to be there. And it's a noncompulsory -- it's a
5 noncompulsory dispute resolution mechanism.

6 Put that aside for a moment, Judge. The model I
7 usually use is I allow the parties to exchange whatever
8 documents they want to exchange and provide the mediator with a
9 confidential mediation statement so the mediator can be
10 informed without giving each other, the parties, a free shot at
11 discovery.

12 And I was very concerned about that because, as you
13 understand, Judge, the defendants here don't want to be put
14 into the position of making the plaintiffs' case. And they
15 ought not be.

16 THE COURT: Well, that's what I said. I didn't -- I
17 really didn't think, to the extent it was going to be dealing
18 with the merits, the mediation should require elaborate
19 productions going to the merits.

20 MR. HERMAN: My thought is that the mediation
21 statements, to the extent the parties want to submit them, in
22 confidence to the mediator, with the mediator to ask permission
23 to release parts of it. And that's the way it would be a fair
24 process at this point.

25 Remember, Judge, there's no complaint filed now.

1 THE COURT: Well, it seems to me the way it should
2 work is the parties should meet -- I mean must meet and confer
3 to discuss their ground rules for the mediation beyond the very
4 basic ones that you've just summarized. So if they want to go
5 farther, if they want to get into real detail on an ordinary
6 course defense, for example, they can. Because it may well be
7 that there's -- one of you actually has a slam dunk on that and
8 they'll settle it for one cent on the dollar, which happens.

9 On the other hand, I don't think you should be forced
10 to do that, but that you should be forced to at least address
11 the merits with the mediator.

12 MR. HERMAN: With the mediator, Judge.

13 THE COURT: Yes.

14 MR. HERMAN: I'm perfectly happy as long as the
15 mediator takes confidential submissions to discuss virtually
16 any issue with the mediator.

17 THE COURT: Right.

18 MR. HERMAN: My experience is that that works.

19 THE COURT: Okay.

20 MR. HERMAN: And then the mediator asks permission to
21 disclose to the other side what's appropriate.

22 THE COURT: Right. Okay.

23 MS. HAFHEY: If I can comment here. Because I don't
24 think that we are in big disagreement here

25 The way we had set up the proposed order was a process

1 so that the mediator would get information.

2 THE COURT: Right.

3 MS. HAFLEY: I think the only difference that Mr.
4 Herman and I have is -- and it's a, I guess, a philosophical
5 one -- I've always seen it work better where the parties
6 exchange briefs so that you can share that -- the other side's
7 arguments and strengths and weaknesses with your business folks
8 so that mediation can be successful.

9 THE COURT: Well, I think that's what the parties
10 should be forced to talk about at the meet and confer session.

11 MS. HAFLEY: Okay.

12 THE COURT: You may be willing to do that. But if
13 not, I think they should provide -- should be --

14 MR. HERMAN: Your Honor, if I'm writing an advocacy
15 piece, it's going to look different than if I'm writing a
16 confidential statement to a mediator.

17 THE COURT: No, I understand. But -- that's fine.
18 But I think that -- this is what I would like on this. The
19 parties meet and confer as set forth in here to discuss the
20 scope of the mediation beyond that set forth immediately below.
21 Okay?

22 And then --

23 MR. HERMAN: And can we meet and confer by phone,
24 Judge?

25 THE COURT: Yes. I think that's what this --

1 MR. HERMAN: By phone conference.

2 THE COURT: -- I think that's -- yes, it says hold a
3 telephonic meet and confer.

4 MR. HERMAN: Okay.

5 THE COURT: And then for the -- and I think there
6 should be a businessperson there with authority -- I don't know
7 if it's ultimate authority -- for that first conference. It
8 should be someone who knows what he's talking about or she's
9 talking about.

10 The mediation itself, for those who have teed up Rule
11 4(m)/Rule 15 issues, clearly will cover those issues. And the
12 mediator will have the -- will have access to what's been
13 submitted on that.

14 In addition, the parties will discuss the possibility
15 of settlement on the merits and provide the mediator in advance
16 of the mediation with a brief confidential mediation statement
17 with regard to their views on the merits.

18 The mediator may -- certainly has the -- well, the
19 other point -- this should be governed generally and expressly
20 by general order M-390. So you don't need to have anything in
21 here about good faith; it's in the order. And -- it's in order
22 390.

23 And the -- let me just raise one other point with you.
24 It probably seems -- I think it is fair to me, in addition to
25 providing the confidential mediation statement on the merits to

1 the mediator, the parties should identify to each other the
2 issues that they would raise in the mediation, i.e., if you're
3 raising an ordinary course defense, if you're raising a new
4 value defense. Just so there's a basic sense of what's being
5 raised here so they can have their financial person focusing on
6 that and, similarly, you can have -- it's probably not going to
7 be much on their end. I mean you have their complaint, so you
8 know what it is.

9 MR. HERMAN: Well, actually not, Judge. That's part
10 of the problem.

11 THE COURT: Well --

12 MR. HERMAN: Actually not.

13 THE COURT: They've given you the model -- the
14 proposed complaint.

15 MR. HERMAN: Right, Your Honor. And Your Honor's
16 already asked them to update those proposed complaints, to some
17 extent, with regard to a number of defendants on the record.
18 So that's another issue that's out there.

19 THE COURT: All right.

20 MS. HAFLEY: I guess I don't understand what the issue
21 is. We provided the reconciliation and we've done the other
22 things the Court has ordered to do at this date.

23 THE COURT: Are those in the form of a proposed
24 amended complaint at this point?

25 MS. HAFLEY: We have identified the transfers that

1 have -- that would be taken away from the proposed amended
2 complaint, if that's the process that happens, to each of the
3 defendants. And --

4 THE COURT: All right.

5 Well, as long as they give you a list of the transfers
6 that they're focusing on, I think that should be enough.

7 MS. HAFLEY: We have --

8 MR. HERMAN: We still don't have a list of transfers
9 that we can figure out what they're talking about.

10 THE COURT: Well, that's a separate issue. I mean
11 they only go as far as they can go.

12 MR. HERMAN: Right.

13 THE COURT: And that's what you'll tell the mediator.

14 MR. HERMAN: Right.

15 THE COURT: I mean that'll be on your list, right?

16 MR. HERMAN: Your Honor, that's why we're --

17 THE COURT: All right. So they should --

18 MR. HERMAN: -- part of the reason we're here today.

19 THE COURT: -- they should provide you, if they
20 haven't already, the list of the transfers that they're looking
21 to avoid in the proposed amended complaint.

22 MR. HERMAN: And an amended complaint in the form that
23 they actually will file.

24 THE COURT: Well, I don't know if they have to
25 actually file -- prepare the proposed amended complaint -- or

1 is that --

2 MS. HAFLEY: I don't think we have a problem with
3 that, Your Honor.

4 THE COURT: Okay, fine.

5 MS. HAFLEY: It probably would facilitate things for
6 those defendants that have --

7 THE COURT: Then -- all right. So in addition to the
8 confidential brief mediation statement, each side will provide
9 the other -- obviously, all subject to Rule 408 in the general
10 order -- their list. Well, the debtor will provide their
11 proposed amended complaint which identifies the transfers. The
12 defendant will provide its list of issues. That's -- I think
13 that's sufficient.

14 And it's solely for purpose of settlement. If you
15 think of another issue later, before trial, there's no --
16 there's no harm, no foul. It's not --

17 MR. HERMAN: I'll ask one more question, Judge. Where
18 do you see these mediations taking place? In what locations.

19 THE COURT: Well --

20 MR. HERMAN: The debtor picked a location other than
21 necessarily the Southern District of New York.

22 THE COURT: Right.

23 MR. HERMAN: So --

24 THE COURT: I think it's --

25 MR. HERMAN: -- how do we cut the costs?

1 MS. HAFLEY: It --

2 THE COURT: -- look, I think it's -- I actually, when
3 I first read their order, I said good for them, because I
4 thought a lot of people would actually be in Michigan. But --
5 or in the Midwest because there are a lot of suppliers.

6 But it should really be for the convenience of the
7 parties. And if there's a dispute, I'll decide it.

8 MS. HAFLEY: And that was --

9 MR. HERMAN: But I don't have to go to Michigan,
10 Judge?

11 THE COURT: Well --

12 MS. HAFLEY: That was the sole intent of put it
13 together, that if people --

14 THE COURT: -- well, your client -- if your client's
15 in Michigan, they may want you to go there.

16 MR. HERMAN: No, they may want, but my client happens
17 to be in Texas.

18 THE COURT: All right. Well, that's a different
19 story.

20 MS. HAFLEY: We'll work that out.

21 THE COURT: That wouldn't have been in because you're
22 outside -- that's outside of 140 miles of Troy. So --

23 MS. HAFLEY: Right.

24 MR. HERMAN: Right. So --

25 THE COURT: -- you wouldn't have had to have gone to

1 Michigan, anyway.

2 MR. HERMAN: You know, I'd probably be comfortable
3 saying Michigan or New York or the convenience of the parties
4 as otherwise agreed to.

5 THE COURT: Okay. That's fine.

6 MS. HAFLEY: And I think that's how we had it set up.

7 THE COURT: Well --

8 MR. HERMAN: I don't think you have New York
9 mentioned. That's my recollection.

10 THE COURT: Not everyone here's a New York lawyer,
11 though.

12 MR. HERMAN: That's for sure, Judge. Although I
13 think -- well, maybe everybody in the courtroom is at this
14 point. Well, not some of the folks from Detroit.

15 THE COURT: Okay. Okay. All right, so I think that
16 covers that.

17 Now, this is just a mediation --

18 MS. HAFLEY: Could I ask a --

19 THE COURT: -- for the Rule 15 folks. I think that
20 mediation on the merits, for those who are going right to the
21 merits, should be more detailed. I don't have any real problem
22 with what they're proposing there as far as a more detailed
23 statement on the merits.

24 I'm not requiring you folks to go through it twice, if
25 that's what you're worried about.

1 MR. HERMAN: Right. No, Judge. I -- again, I have
2 this concept that folks are going to disclose more to the
3 mediator --

4 THE COURT: Right.

5 MR. HERMAN: -- if they're acting in good faith than
6 they will to each other. And that's just the nature of
7 mediation.

8 THE COURT: Well, actually, at that point, you'll
9 have -- remind me. As far as the mediation, you'll have --
10 you'll have had an answer by then, right? Or a motion.

11 MS. HAFLEY: I'm sorry?

12 THE COURT: Mediation for those people who are going
13 right to the merits.

14 MS. HAFLEY: We will have already had an answer.

15 THE COURT: All right. I think the same procedures,
16 then --

17 MS. HAFLEY: Right.

18 THE COURT: -- for both.

19 MS. HAFLEY: Just a point of clarification for me,
20 then, in regards to the Rule 15 group of defendants. The
21 mediation, is it this Court's thought that that mediation would
22 only focus on the Rule 15?

23 THE COURT: No.

24 MS. HAFLEY: Okay.

25 THE COURT: No, absolutely not.

1 MS. HAFFEY: Because we --

2 THE COURT: It focuses on the --

3 MS. HAFFEY: I thought you were clear in October that
4 you --

5 THE COURT: It's just that the mediator will have a
6 lot more information on the Rule 15 issues.

7 MS. HAFFEY: Right. Okay.

8 MR. HERMAN: I think Your Honor said that the parties
9 should meet and confer about the scope of --

10 THE COURT: Well, but the scope will include what I've
11 just set forth, which is mediation on Rule 15 and the merits.
12 The disclosures will be, at a minimum, what I've just outlined.
13 They'd meet and confer as to whether they're willing to provide
14 more disclosure. If -- the less disclosure you provide, the
15 more risk that there may not be a settlement. So you should
16 talk about that. That's all. But I think -- as a practical
17 matter, you'll spend time on the merits, I think, for most
18 people.

19 The one other issue where there was a slight
20 disagreement was the duration of the mediation. On a
21 preference case, I would think that you should pretty much be
22 done after four hours. I think it can be longer if the parties
23 agree.

24 But I really don't want to -- the problem with setting
25 a longer date is that people just horse around. Not in terms

1 of acting in bad faith, but it's just -- I did a mediation
2 myself a couple weeks ago. And I told both sides what it will
3 settle at. And then we spent eight more hours. And they --
4 and actually, they broke because it was nighttime, they
5 couldn't reach people in London. And then two days later, it
6 settled at that exact number. And they spent another 100,000
7 dollars getting there.

8 So I'm kind of inclined to limit it to four hours,
9 subject to the parties' agreement to continue longer. And that
10 way, the debtor can do two in one day, too.

11 MS. HAFLEY: We have no objection to that, Your Honor.

12 THE COURT: Okay. All right.

13 MR. HERMAN: I've seen that work, Your Honor.

14 THE COURT: Okay. All right.

15 As far as the identifying a mediator, it's -- yes,
16 it's forty-seven cases, but that's a lot less than 2,000. And
17 I have a couple people in mind who do preference cases all the
18 time and know the issues. But did you guys have any
19 suggestions as to who might be a mediator for this?

20 MR. HERMAN: I have a conflict, Judge.

21 THE COURT: Yes, I understand. But did you have any
22 thoughts about that? The debtors' proposed order actually
23 identified people -- I mean had it blank for identifying
24 people.

25 MS. HAFLEY: Right.

1 THE COURT: Have you had any discussions about who you
2 think would do a good job on this?

3 MS. HAFLEY: We've had discussions internally; we have
4 not had a chance to talk with defense counsel and we will.

5 THE COURT: All right, well, why don't you -- before
6 you submit the order, why don't you have those discussions? My
7 thought would be that these are -- I would be reluctant to
8 impose this on a judge, one of my colleagues. It's not like --
9 if there were 2,000 of them and I was -- and I wanted help to
10 winnow them down to forty-seven, I'd impose -- I'd ask a judge
11 to do it, and I'm sure he or she would.

12 But it seems to me, at this stage, you want someone
13 who's a practicing lawyer that deals with preferences all the
14 time. And there are a few people out there that do that. And
15 to the extent that there are one or two of those people who
16 also actually know the auto industry, that would be helpful,
17 but not necessary. But it would be helpful. So I would ask
18 you to, maybe, to identify a couple people like that.

19 MS. HAFLEY: Okay. We'll work together and see if we
20 can come up with a proposed list.

21 THE COURT: Okay. Does anyone have any issues with
22 that sort of job description? Okay. All right.

23 All right. Okay. Is there an issue -- on the merits,
24 discovery would be by the Federal Rules. And that was a change
25 I was going to suggest, anyway. My practice with preference

1 cases is basically in a pretrial conference to set the
2 discovery deadline and then have the parties follow the Federal
3 Rules. And if they're not finished and it's their fault, it's
4 too bad; if it's someone else's fault, I'll extend the
5 deadline.

6 But as far as the discovery on Rule 15, I guess my
7 inclination is also to set a deadline and have it be done by
8 the Federal Rules within that.

9 And as far as Rule 15 is concerned, again, I think --
10 you know your internal prejudice because you've been focusing
11 on it for several months. As far as the debtors are concerned,
12 you're going to get, I think, what's fair for you to be
13 provided with on that. So I don't know. What are we talking
14 about here? Sixty days? Ninety days?

15 MR. HERMAN: Sounds about right.

16 Your Honor, I can speak for Victory Packaging, but I
17 see other folks nodding in the back of the courtroom, and I --

18 THE COURT: Right.

19 MR. HERMAN: -- don't know what the folks on the phone
20 think. But it's acceptable to Victory.

21 THE COURT: Which?

22 MR. HERMAN: Sixty or ninety days.

23 THE COURT: All right. Well should we pick --

24 MR. BARRON: Ninety.

25 THE COURT: Well, I was going to say shall we pick --

1 MR. HERMAN: Sorry. Ninety.

2 THE COURT: -- shall we pick seventy-seven so we stay
3 with seven?

4 MR. BARRON: Ninety days from when?

5 MR. HERMAN: Eighty-four.

6 THE COURT: Well, I was going to say -- I would --
7 well, the close of the mediation is really when you want to go
8 with the discovery, right? Because you don't want to be
9 spending any money on it. So maybe seventy-seven days from
10 then, you're done with it.

11 MR. HERMAN: Ninety-one?

12 MR. BARRON: Can we make it ninety just because it's
13 easier to count?

14 MR. HERMAN: Make it ninety-one, Judge.

15 MR. BARRON: Three months.

16 THE COURT: All right. Ninety-one.

17 MR. HERMAN: Ninety-one because we're keeping the rule
18 of seven.

19 MR. BARRON: Okay.

20 MR. HERMAN: It's a multiple of seven, ninety-one.

21 MR. BARRON: After the close of mediation?

22 THE COURT: Right.

23 MR. BARRON: Thank you.

24 THE COURT: And I will extend a deadline like that if,
25 through no fault of the party, they haven't been able to get

1 what they need. But they shouldn't wait until the last minute
2 to ask me for that. If they're -- if, for some reason, the
3 other side is, in your view, not being responsive, don't wait
4 till the end of the period to tell me that. Tell me that early
5 so that we can stick to the time table.

6 Okay.

7 MR. BARRON: Judge, may I ask a question of Your
8 Honor?

9 Bill Barron for the Heraeus defendants.

10 You spoke briefly about merits discovery being just
11 under the Federal Rules; don't try to micromanage it in this
12 document is what I inferred you to be --

13 THE COURT: Correct.

14 MR. BARRON: -- saying.

15 One question. Under the Federal Rules, I presume once
16 the admitted complaint is allowed and filed and answered --
17 maybe not even answered -- there would be an ordinary Rule 16
18 scheduling conference and Rule 26 initial disclosures, et
19 cetera. I would assume those are embraced in what you were
20 saying.

21 THE COURT: Well, my practice is to have a pretrial
22 conference shortly after the answer is filed. So that -- we're
23 now talking about the Rule 15 people. I'm not really -- those
24 who are going on to the merits, I think -- you've proposed a
25 discovery cutoff and that discovery cutoff date is generally

1 the date I give for people in a preference case unless they ask
2 for more time. And no one has, except -- well, have the two
3 who responded who are going right to the merits, have they
4 asked for more time?

5 MS. HAFLEY: The two that responded, Your Honor,
6 adopted the briefs of the defendants that --

7 THE COURT: Oh, well that doesn't really --

8 MS. HAFLEY: -- crossed off the --

9 THE COURT: -- that doesn't really help.

10 MS. HAFLEY: -- proposed order after the Rule 15. So
11 really --

12 THE COURT: I -- in my view, the discovery cutoff
13 date that you proposed is acceptable, absent someone showing me
14 good cause otherwise for the merits discovery, for those who
15 are going right to the merits. It should not apply to the Rule
16 15 people.

17 Although, I'm telling you now that normally, I impose
18 a ninety-day discovery period. You may have unique issues that
19 you'll tell me about at the pretrial conference.

20 MR. HERMAN: Your Honor, so -- are you adopting the
21 Rule 15 proposal that -- or it's going to be two separate
22 orders, one regarding the Rule 15 people and another one to go
23 right -- the folks that going right to the merits?

24 THE COURT: Yes. It can be in the same order, but
25 it'll --

1 MR. HERMAN: Well, Your Honor --

2 THE COURT: -- I mean they can define the --
3 whatever's easier to draft.

4 MR. HERMAN: The litigation may take turns and twists
5 that are not anticipated. We truly believe that --

6 THE COURT: Well, all I'm saying is they can -- they
7 can define your group --

8 MR. HERMAN: Right.

9 THE COURT: -- and then they could say nothing in the
10 following sections applies to this group. I mean they can put
11 it one order. But as an ultimate matter, the merits discovery
12 and procedures don't apply to your group. Although I'm telling
13 you again, in large measure, they ultimately would if there was
14 a --

15 MR. HERMAN: Judge, I understand that. And the
16 elephant in the room is Stern v. Marshall and the litigation
17 involved in Cudare Brothers (ph.) and whether parts or all
18 these cases are amenable to resolution finding by Your Honor.

19 THE COURT: They're just preference cases, right?

20 MR. HERMAN: Well, Your Honor, there are contract
21 issues, folks maybe ask for jury trials, there's all kinds of
22 things that could happen.

23 THE COURT: There are contract issues?

24 MR. HERMAN: Yes, Your Honor.

25 THE COURT: I thought these were just preference

1 cases.

2 MR. HERMAN: No, Your Honor. I have a contract issue.
3 We assert that there's been an assumed contract. Remember the
4 whole -- that whole issue --

5 THE COURT: Well, but that's -- look --

6 MR. HERMAN: I don't know that Your Honor can finally
7 decide that.

8 THE COURT: -- all right, I -- I'm not -- you know how
9 I think about this.

10 MR. HERMAN: I do. I'm just trying to reserve the
11 rights, Judge.

12 THE COURT: 365 and 547 are unique to the Bankruptcy
13 Code. But that's fine. We'll hear all about that if
14 there's -- when there's a pretrial --

15 MR. HERMAN: Exactly, Judge.

16 THE COURT: -- if and when there's a pretrial
17 conference.

18 MR. HERMAN: I just want to preserve those rights. I
19 don't want to debate it, Your Honor.

20 THE COURT: No, everyone's -- I mean the merits people
21 reserve that, too.

22 All right. On the -- well, I'm not sure there's
23 anything open. Let me go through my markup of the order -- or
24 my notes on the order, I mean.

25 Oh, you know? I understand that both of you were

1 prepared to go to trials with direct testimony solely on the
2 declarations, which is my practice. But I always have a safety
3 valve there, which is if the declarant's a hostile witness or
4 not under your control, you can't do it -- you can't write
5 their declaration. So there should be that "except when the
6 witness is not under the party's control" should be in there
7 for on that.

8 I've never imposed page limits. I figure briefs are
9 more effective if they're short, so -- but I don't know how
10 strongly people feel about that. What I really don't like is
11 people making motions for more page limits. So --

12 MR. HERMAN: Let's not have page limits, Judge.

13 THE COURT: I -- these are fine. I think that's fine
14 to have the page limits in here.

15 And we already dealt with -- the debtors have revised
16 on the time to answer or move on amended complaint? That's now
17 the regular time; it's not seven days?

18 MS. HAFLEY: That's correct.

19 THE COURT: Okay. All right. So I think -- I think
20 that's it.

21 MR. HERMAN: Judge, on page limits. Instead of motion
22 practice if somebody needs more, they should -- we can try to
23 work it out and then --

24 THE COURT: Yes. Right.

25 MR. HERMAN: -- contact the Court instead of having a

1 motion practice.

2 THE COURT: Right. I get it. I'm putting people on
3 notice that -- well, I've never -- I've never restricted page
4 limits because I think it's usually to the litigant's
5 disadvantage to have longer --

6 MR. HERMAN: Your Honor, why don't you just strike
7 that out, then?

8 THE COURT: -- longer pages.

9 MR. HERMAN: And you'll have to just trust some people
10 to be reasonable.

11 THE COURT: Right.

12 MS. HAFLEY: Can I ask a clarifying question? I think
13 I understand this, but I just want to be certain.

14 So regarding a Rule 15 defendant after we're through
15 the Rule 15 hearing process and if the case is proceeding to a
16 merits trial, they'll --

17 THE COURT: The debtor will probably schedule a
18 pretrial conference.

19 MS. HAFLEY: And the scheduling order for that
20 particular case will be set at the pretrial conference?

21 THE COURT: Yes. And it should say that the debtor
22 and the defendant shall have discussed an appropriate discovery
23 cutoff date before the pretrial conference.

24 MS. HAFLEY: Okay.

25 THE COURT: The only -- I mean the other point I had

1 here -- and I just want to be clear on this; I want to make
2 sure we're all on the same page on this -- is that while these
3 are called Rule 15 prehearing and hearing procedures, I really
4 do want that record to serve two purposes, both for Rule 15 and
5 for the remaining open 4(m) issue.

6 MR. HERMAN: Your Honor, as a matter of clarification,
7 keep calling it prejudice affidavits --

8 THE COURT: Right.

9 MR. HERMAN: Does that --

10 THE COURT: Well, it's notice as well.

11 MR. HERMAN: -- does it need to include frustration
12 arguments and all other arguments --

13 THE COURT: No.

14 MR. HERMAN: -- defendants will have against --

15 THE COURT: No.

16 MR. HERMAN: -- the Rule 15 motion.

17 THE COURT: Well, I don't know what frustration --
18 what do you mean by frustration?

19 MR. HERMAN: One -- frustration is one of the -- one
20 of the defenses that's in possibility for the complaint to go
21 forward.

22 MR. BARRON: Futility.

23 MR. HERMAN: Futility, rather. I'm sorry. Futility.

24 THE COURT: No, no, no. I've already -- I've already
25 dealt with that. I'm really just focusing on the factual

1 record for Rule 4(m) as well as Rule 15, which, I think,
2 overlaps --

3 MR. HERMAN: Yes, but I -- but I -- but I think
4 futility

5 THE COURT: -- a hundred percent, which is --

6 MR. HERMAN: -- has not been fully briefed and fully
7 argued.

8 THE COURT: -- which is -- I'm sorry, what?

9 MR. HERMAN: The futility arguments have not been
10 fully briefed and argued --

11 THE COURT: No, I think they have.

12 MR. HERMAN: -- and evidence presented.

13 THE COURT: I think they -- I believe they --

14 MR. HERMAN: No, they have not. They have not.
15 Really, they have not. So --

16 THE COURT: I don't -- that was the whole point on the
17 Rule 15 is that people objected, saying that this is --

18 MR. HERMAN: Futile.

19 THE COURT: -- futile, yeah. I've already dealt with
20 that. I told them to amend their complaint.

21 MR. HERMAN: Your Honor, we still have the contract
22 issue, which goes to futility if they can't meet their -- meet
23 the elements of a preference if there's been an assumed
24 contract. That issue's still floating around out there.

25 THE COURT: Oh, unique issues. All right. I

1 understand now.

2 MR. HERMAN: Right. Sorry.

3 THE COURT: I understand that point.

4 MR. HERMAN: All Rule 15 matters have to be
5 adjudicated.

6 THE COURT: That haven't already been ruled on.

7 MR. HERMAN: Correct, Judge.

8 THE COURT: Right. The unique-to-the-defendant
9 issues. And there are -- there are two or three who have, like
10 your client, asserted that the contract had been assumed.
11 That's fair.

12 MS. HAFLEY: So, to Mr. Herman's point, then, they
13 would be included in that declaration so that --

14 THE COURT: Yes. Right.

15 MS. HAFLEY: -- the reorganized debtors are on notice
16 as to what that --

17 MR. HERMAN: So it's broader than futility; it's going
18 to be all Rule 15 issues --

19 THE COURT: No. No.

20 MS. HAFLEY: That haven't already been --

21 MR. HERMAN: -- that are still open.

22 THE COURT: That are unique to the -- all Rule 15 that
23 are unique to the particular defendant --

24 MR. HERMAN: We'll raise them.

25 THE COURT: -- and that have not already been ruled

1 on.

2 MR. HERMAN: Right.

3 THE COURT: Some of you have already -- I mean I ruled
4 on some of these already.

5 MR. HERMAN: Some of them.

6 THE COURT: For example, you said you haven't
7 identified the transfer. And I said well, you have to amend
8 the complaint to do that. So that's done with.

9 MR. HERMAN: No, I'm talking about -- right, specific
10 issues --

11 THE COURT: Okay. All right.

12 MR. HERMAN: -- that you have not ruled on -- or, to
13 the best of my knowledge, you have not ruled on.

14 THE COURT: Okay. And the -- and then that also --
15 and I think this proposed order recognized this. It included
16 notice to the extent the debtor disputes whether the defendant
17 got notice or not of the order. And the -- so that should --
18 that should be reflected in the order as far as the issues to
19 be tried.

20 MR. BARRON: On that last point, Your Honor, you were
21 mentioning the notice issue. I was not able to be part of the
22 call, at least all of it, yesterday. I don't know that there
23 was a resolution of dispute, which I believe exists.

24 The debtor wanted to be able to take discovery on what
25 I think it calls constructive notice. In other words, somebody

1 just saw a proposed plan of reorganization or a disclosure
2 statement. I believe you ruled back in October that those are
3 issues of -- a matter of record. In other words --

4 THE COURT: Well --

5 MR. BARRON: -- there's no need for discovery on that.

6 THE COURT: -- I guess what I thought was -- the only
7 aspect I thought was open on that -- and I did reread the
8 transcript this morning -- was if someone's affidavit said we
9 knew nothing about this, then they -- it seemed to me that they
10 could cross-examine that person, that witness, either if he's
11 speaking on his own behalf or on behalf of the organization.

12 MR. HERMAN: So --

13 THE COURT: If they chose to. I'm not sure they will.
14 But they may just simply say look, how -- then they were
15 wearing a blindfold because anyone would know it.

16 They may take that approach and -- but they may want
17 to test that person if he says or she says in his affidavit
18 that Methode did not know, period.

19 MR. HERMAN: Or you may hear, though, that parties --

20 THE COURT: But that's not -- that's not constructive
21 notice; that's actual notice.

22 MR. HERMAN: Right. Actual notice.

23 THE COURT: So I think, going -- Mr. Barron, going
24 back to your point, if it's just --

25 MR. BARRON: It --

1 THE COURT: -- it's -- I'm -- that's actual notice.
2 So they're able to test in averment that we didn't actually
3 know. But they -- constructive notice is a legal concept.
4 Right.

5 MR. BARRON: Because I thought your ruling back in, I
6 think, October --

7 THE COURT: So, just to be clear, they can't -- if
8 someone says, as a matter of fact, we did not know, then they
9 can examine that person. But if their only argument is that,
10 as a matter of law, you should say that, objectively, they had
11 constructive notice, then there's no need to take discovery on
12 that.

13 MR. BARRON: I think I understand.

14 THE COURT: Okay.

15 MR. BARRON: I think the record will be clear. But
16 the fact is, I think all of these Rule 15 defendants and those
17 who aren't even in the room today have put in one or more
18 affidavits saying we had no idea we had been sued.

19 THE COURT: Right.

20 MR. BARRON: If that makes them candidates for a
21 deposition, that's what I wanted to understand.

22 THE COURT: Well, I think it does, although I don't
23 know what -- I'm assuming the debtors -- they have a right to
24 test that; it's a factual assertion.

25 MR. HERMAN: Or any theme similar to those, Judge --

1 THE COURT: Right. I think you --

2 MR. HERMAN: -- where a party may have had reason to
3 believe it wasn't sued.

4 THE COURT: Right. So I mean I'm assuming that the
5 debtor will use its discretion on that. But it's a factual
6 assertion; it's being offered as evidence, so they have a right
7 to take discovery on that.

8 MR. BARRON: Understood. Thank you.

9 THE COURT: Okay.

10 MR. HERMAN: Your Honor, I think you've already said
11 this, but I think it's a blanket issue. If the parties -- and
12 I think this works for my client. I think -- I suspect it
13 works for the debtor. If there's a dispute about discovery, we
14 don't need formal motion practice --

15 THE COURT: No.

16 MR. HERMAN: -- we'd contact chambers.

17 THE COURT: What you do on that is provide a letter to
18 chambers, CC'ing the other party. And the other party should
19 really respond promptly, like in a day or so. And then I'll
20 either respond by e-mail or, if I need to have a discovery
21 conference, I'll do that on the phone.

22 MR. HERMAN: That's great.

23 THE COURT: Okay. And that's in -- that's in my
24 standard pretrial order that's on the website. If you want to
25 put that paragraph in this, that's fine.

1 MR. HERMAN: That's just efficient, Judge. Thank you.

2 THE COURT: Okay. All right, anything else? No?

3 MR. HERMAN: I'm done, Judge.

4 THE COURT: Okay.

5 MR. HERMAN: Happy holidays.

6 THE COURT: Thank you.

7 MR. HERMAN: Thank you, Your Honor.

8 MS. HAFLEY: Judge, one last thing. Just so I
9 understand. We'll be working, then, from the reorganized
10 debtors' --

11 THE COURT: Yes.

12 MS. HAFLEY: -- proposed order, making the changes
13 that this Court ordered today.

14 THE COURT: Yes. So I think what you should do is
15 circulate a blackline to all parties who were here, on the
16 phone, and who've filed objections. And try to get it in to
17 chambers next week. Although I recognize it's an odd week. So
18 that's fine.

19 MS. HAFLEY: Thank you, Your Honor.

20 THE COURT: Okay.

21 MR. HERMAN: Thank you, Judge.

22 MS. HAFLEY: Happy holidays.

23 THE COURT: Okay.

24 (Whereupon these proceedings were concluded at 11:41 AM)

25

C E R T I F I C A T I O N

I, Shalom Boroda, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Shalom
Boroda

Digitally signed by Shalom Boroda
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